Exhibit #43

WORKPLACE INJURY LITIGATION GROUP

DENVER, CO - WASHINGTON, DC

REPRESENTING THE INTERESTS OF OVER 6 MILLION WORKERS INJURED ON THE JOB EACH YEAR

November 8, 2001

Ms. Loretta Young
Office of Advocacy EH-8
US Department of Energy
1000 Independence Avenue SW
Room 1E 245
Washington DC

Re: Physician Panel Rule

Dear Ms. Young:

These comments are submitted on behalf of the Workplace Injury Litigation Group (WILG). WILG is a national non-profit association of attorneys who are dedicated to advancing just and fair remedies for workers who are victims of occupational injury and disease.

WILG believes DOE's proposed physician panel rules are inconsistent with EEOICPA and would create barriers, rather than provide assistance to, workers injured or made ill while working on DOE funded projects. For that reason, WILG urges DOE to adopt final regulations consistent with the recommendations in these comments.

Congress enacted the EEOICPA because state workers' compensation programs had failed adequately to compensate employees for work-related injuries and illnesses caused by work at DOE facilities. Congress' goal was to ease the existing barriers to compensation under state law by directing DOE to assist workers in obtaining indemnity payments and medical benefits when a panel of physicians determines their ailments are work-related. DOE's proposed rules frustrate these goals and are inconsistent with the EEOICPA because they incorporate the failure of state workers' compensation systems to compensate DOE facility workers with work-related ailments.

DOE's proposed rules require that claimants demonstrate they meet state law criteria for workers' compensation. But, those claimants who meet all the state law requirements for compensation do not need DOE assistance to obtain it; having met all the criteria for workers' compensation under state law, such a claimant can expect an award of compensation to be issued. DOE assistance is valuable only to those claimants who otherwise would not qualify for compensation under state law – exactly the group of people DOE's rules exclude from receiving its assistance.

POST OFFICE BOX 300488, DENVER, CO 80203

866-830-0112 • 303-830-0112 • FAX 303-830-2543 • WILG@WILG.ORG • WWW.WILG.ORG

Further, DOE is particularly ill suited to determine which claimants meet the state law criteria for receiving compensation. Under state law, when a worker's eligibility for compensation is contested, the worker has an opportunity for an adversary hearing to present evidence showing that an award of compensation is appropriate. Adverse rulings can be appealed, ultimately to the judicial branch of state government. The executive and judicial branch decision makers can interpret, modify, expand or change existing precedents to provide coverage for claims initially denied. DOE's procedures do not afford injured or ill workers similar due process. Adverse awards cannot be appealed. DOE cannot interpret, modify, expand or change existing state law affecting workers' compensation. Therefore, the process of determining who meets state law criteria for compensation is more restrictive than the traditional procedures employed by the states.

As construed by DOE, the physician panels represent an obstacle to compensation for employees who have already shown they meet the compensation criteria established by state law. Under state law, an employee must present the opinion of one expert that their ailment is work-related. An employer or insurer contesting the claim might then introduce the contrary testimony of another expert. The credibility of these expert opinions is weighed by the decision maker. Thus, workers may obtain worker's compensation based on the expert opinion of one physician. DOE rules require that the worker convince three physicians that the ailment is work-related. Why would workers who have already established that they meet all the criteria for compensation under state law voluntarily assume the added burden of persuading three physicians their ailment is work-related, when state law requires only one expert to support the claim? Further, DOE's proposed rules are wrong to give the Office of Advocacy the authority to ignore the opinion of the physician panels. Clearly such a procedures fails to assist workers in obtaining compensation, but pose new obstacles to receiving compensation.

Instead, any program to **assist** workers in obtaining increased compensation for work-related ailments should take a different approach. Workers who claim their ailments are related to work at a DOE facility should have the opportunity to persuade a physician panel of this causal link. If three physicians agree that an ailment is related to DOE work, then DOE must **assist** the worker in receiving compensation.

This assistance can take many forms. First, DOE should use whatever leverage it has on its contractors and subcontractors to pay claims where a physicians panel has determined a workers' ailment is work-related. Even when the workers ability to meet all the requirements of state law is contested a substantial settlement in the workers' favor is appropriate. Many contested claims are settled under state law even when one party claims the other has failed to satisfy all the criteria for compensation. When the parties settle a claim, it does not mean that both accept that the worker has met each criteria of state law for compensation. Settlement usually indicates that each side, after evaluating the strengths and weaknesses of its claim, has decided that compromise rather than litigation is in its interest. DOE should use its influence to secure such settlements for workers when a physicians panel finds a causal link to DOE funded work. If DOE prescreens claims and denies assistance to those whose claim, it decides, has some weakness, then DOE reduces the incentives for employers/insurers to settle the claims of nuclear workers and provide compensation to them. If DOE, on the other hand, vigorously assists all

nuclear workers whose ailments are causally related to work, then DOE's assistance will create an added incentive for employers/insurers to settle these claims by providing compensation to ill workers – a clear goal of EEOICPA.

DOE should also use its resources to assist workers in obtaining state workers' compensation benefits in contested cases. The fact that an employer disputes an employee's eligibility for compensation should not dissuade DOE from vigorously advocating the worker's eligibility before state compensation boards. State workers' compensation boards and state judges are free to expansively interpret, modify or change existing precedents to cover new circumstances. Indeed, the legal doctrine of stare decisis is premised on the notion that later cases will expand upon old precedents and apply them to new factual situations. DOE should use all its resources to see that state law precedents are expanded to compensate all workers whose injuries or illnesses are causally related to work.

Finally, DOE should provide financial assistance to enable workers to prove their claims. This financial assistance should include DOE payment for medical exams necessary to establish the causal link between work and disease and expert witness payments for physicians willing to testify to that link in workers' compensation hearings. Without such financial assistance, workers will have difficulty bringing successful claims for compensation before state tribunals.

Thank you in advanced for considering these comments.

Very truly yours,

Randy S. Rabinowitz

Randy S. Rabinowitz
Federal Counsel